Supershuttle of Orange County, Inc. *and* General Truck Drivers, Office, Food & Warehouse Union, Teamsters Local 952, International Brotherhood of Teamsters, AFL–CIO, Petitioner, and Employees Action Representatives, Intervenor. Case 21–RC–20060

March 23, 2000

DECISION ON REVIEW AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

The issue in this case is whether the parties' negotiation of a collective-bargaining agreement, intended by them to resolve outstanding Section 8(a)(5) and (1) charges, should result in the dismissal of a rival union's petition pursuant to *Douglas-Randall, Inc.*, 320 NLRB 431 (1995), and *Liberty Fabrics, Inc.*, 327 NLRB 38 (1998). Contrary to the Acting Regional Director's decision, we conclude that the petition should be dismissed.

Background

Intervenor Employees Action Representatives (Intervenor) was certified on July 21, 1997, as the bargaining representative of a unit of van drivers, washers, and checkers and reservation desk representatives at the Employer's facility in Anaheim, California. While negotiations for an initial collective-bargaining agreement took place, they had not yet been successful when, on March 16, 1999, the Petitioner filed a petition to represent the unit employees. Processing of the petition was held in abeyance (blocked) by unfair labor practice charges, filed by the Intervenor in November 1998, prior to the petition, alleging violations of Section 8(a)(5) and (1) of the Act.[1] The Employer and the Intervenor continued negotiations while the charges were pending, and, on April 26, 1999, they reached an agreement.

On May 13, 1999, the Acting Regional Director dismissed the unfair labor practice charges because the parties had reached a collective-bargaining agreement and no outstanding unfair labor practice issues remained unresolved between them.[2] The Acting Regional Director found that the new agreement was not a bar to processing of the petition and directed an election. The Intervenor and the Employer each filed a request for review, and the Petitioner filed an answering brief. On July 22, 1999, this panel granted review and remanded the case to the Regional Director for a determination of whether the parties intended their collective-bargaining agreement to resolve the unfair labor practice charges. On August 26, 1999, the Acting Regional Director issued a Supplemental Decision specifically finding that the parties' negotiation of a collective-bargaining agreement was intended by both parties to settle the pending unfair labor practice charges, but nonetheless concluding that it was not a bar to the petition. He ordered that the election ballots be tallied.[3] The Intervenor and the Employer each filed a request for review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully reviewed the case in light of the record, the requests for review, and answering brief, we reverse the Acting Regional Director's Supplemental Decision and find that, pursuant to *Douglas-Randall, Inc.*, supra, and *Liberty Fabrics, Inc.*, supra, the petition must be dismissed because the parties have negotiated a contract that resolved the outstanding unfair labor practice charges.

Analysis

In *Douglas-Randall*, 320 NLRB at 435, the Board overruled precedent and returned to a policy of dismissing a decertification (or other) petition filed subsequent to alleged unfair labor practice conduct where the charges are resolved by a Board settlement agreement in which the employer agrees to recognize and bargain with the Union. The Board held:

> Based on all of the above, in order to best effectuate the Act's goals of fostering stable labor relationships, promoting peaceful settlements, and encouraging collective bargaining, we have decided to overrule *Passavant* [*Passavant Health Center*, 278 NLRB 483 (1986)] and its progeny, and to return to the Board's historical procedures for handling decertification petitions (or other petitions challenging unions' majority status) when the parties have resolved concurrent unfair labor practice allegations by entering into a settlement agreement. Thus, an employer's agreement to settle the outstanding unfair labor practice charges and complaints by recognizing and bargaining with the union will require final dismissal, without provision for reinstatement, of a decertification petition or other petition challenging

[1] The charges alleged that the Employer unilaterally implemented contract proposals in excess of proposals made at negotiations, reneged on an agreement to include a union-security clause, engaged in surface bargaining, refused to process grievances, and refused to provide information relevant to bargaining.

[2] The Acting Regional Director's letter provided, inter alia:

> As a result of the investigation, it does not appear that further proceedings on the charges are warranted. The evidence establishes that the [Intervenor] and the Employer have reached agreement on a new contract. Further, the [Intervenor] does not claim that any unfair labor practice issues remain unresolved between it and the Employer. Accordingly, it would not effectuate the purposes and policies of the Act to further pursue these charges.

The Intervenor appealed the dismissal of the charges, and the General Counsel subsequently denied the appeal. In denying the appeal, the General Counsel also indicated that the parties would have the right to request review of any final decision by the Regional Director regarding the representation petition, and could thereby raise the issue of the viability of the petition in the circumstances of the case.

[3] An election was conducted on July 23, 1999, and the ballots were impounded pending the resolution of these requests for review.

> the union's majority status filed subsequent to the onset of the alleged unlawful conduct. When the parties reach a collective-bargaining agreement during bargaining pursuant to a settlement agreement, that contract will, of course, serve as a further bar to the petition under the Board's normal contract bar rules. Only when the blocking charges have been unconditionally withdrawn without Board settlement, dismissed as lacking in merit, or litigated and found to be without merit, will a petition filed subsequent to the alleged conduct be subject to reinstatement.

Liberty Fabrics, supra, extended *Douglas-Randall*, which involved a Board settlement agreement approved by the Regional Director, to cases involving a private settlement agreement between the parties. In *Liberty Fabrics*, the parties continued negotiations in the face of the outstanding unfair labor practice charges, reached a new collective-bargaining agreement, and included in that agreement a provision settling the unfair labor practices. The question presented in this case is whether the principles and policy considerations underlying those decisions apply here where the parties have reached agreement on a collective-bargaining agreement intended by them to resolve pending unfair labor practice charges.

The key to both *Douglas-Randall* and *Liberty Fabrics* is that the parties have resolved outstanding unfair labor practice allegations. The result in neither case was dependent on the method the parties used to resolve those allegations. In this case, the Acting Regional Director found that no unfair labor practice issues remained unresolved following the negotiation of the collective-bargaining agreement, a finding that was upheld on appeal to the General Counsel. Effectively, the Acting Regional Director found that the parties resolved the unfair labor practice charges by negotiating the agreement, and he confirmed that this was the parties' intent after holding a hearing on that issue pursuant to the Board's remand.[4]

In *Douglas-Randall*, the Board described only three situations where resolution of pending charges similar to those in this case would *not* result in dismissal of the petition: where the blocking charges have been unconditionally withdrawn without Board settlement, dismissed as lacking in merit, or litigated and found to be without merit. *Douglas-Randall*, supra, 320 NLRB at 435. None of those situations has occurred here. Instead, in this case, the Acting Regional Director has found, and the parties have confirmed, that they resolved all unfair labor practice allegations when they negotiated and agreed to their new collective-bargaining agreement. Thus, the reasoning and the holding of *Douglas-Randall* and *Liberty Fabrics* squarely apply, and the petition must be dismissed.

The Acting Regional Director found *Douglas-Randall* and *Liberty Fabrics* to be inapplicable because in those cases, unlike here, the Regional Directors had made an administrative determination that the unfair labor practice charges had sufficient merit to warrant issuing a complaint. The fact is, however, that no administrative determination was ever made in this case that the unfair labor practice charges should be dismissed as *lacking* in merit. As the Acting Regional Director stated in his Supplemental Decision, "a merit determination on the ULP charges was never made." Accordingly, this is *not* one of the three situations described in *Douglas-Randall* where resolution of pending charges would not result in dismissal of the petition. Further, *Douglas-Randall*, 320 NLRB at 435 (emphasis added), explicitly states that its holding applies to settlements of "outstanding unfair labor practice *charges* and complaints," clearly indicating that a petition should be dismissed following resolution of unfair labor practice allegations even if no merit determination has been made.

Our dissenting colleague suggests that colluding unions and employers could file frivolous unfair labor practice charges and then negotiate a contract before the Board is able to make a determination that the charges lack merit. We are unwilling to yield to an argument that deceitful parties can manipulate the Board's processes to evade decertification or rival union petitions. We emphasize that, in this case, there was no finding by the Acting Regional Director that the unfair labor practice charges lacked merit, nor any claim by any party that the charges were not bona fide. In fact, the Acting Regional Director found that the charges were sufficiently serious to block the petition and hold it in abeyance pending their resolution. In any event, we believe that a regional office is capable of, and has options available for, handling any such situation. For example, it can dismiss a charge at the outset if it is obviously frivolous, or it can continue the investigation notwithstanding the negotiation of a contract, ultimately dismiss the charge if it is found to be lacking in merit, and thereafter process the petition.[5]

For the foregoing reasons, we find that it would effectuate the Act's goals of "fostering stable labor relationships, promoting peaceful settlements, and encouraging collective bargaining"—the stated policy consideration underlying *Douglas-Randall*, 320 NLRB at 435—to apply the principles of that case and *Liberty Fabrics* in this case. We find that, because the unfair labor practice charges were based on conduct preceding the petition,

[4] The Acting Regional Director specifically found: "Based on the record presented herein, it is concluded that the Intervenor and the Employer did intend for the collective-bargaining agreement to settle all unfair labor practice charges."

[5] See *Douglas-Randall*, supra, 320 NLRB at 435, where the Board considered a similar contention in detail and rejected it for similar reasons.

and because the collective-bargaining agreement was intended by the parties to, and effectively did, resolve the outstanding unfair labor practice charges, the bargaining agreement therefore serves as a bar to the representation petition. Accordingly, we shall reverse the Acting Regional Director's decision and dismiss the petition.

ORDER

The Acting Regional Director's Supplemental Decision is reversed, and the petition is dismissed.

MEMBER HURTGEN, dissenting.

My colleagues, having made bad law by a prior reversal of precedent, now extend that bad law even further. The result is a further erosion of the fundamental right of employees to choose, reject, or change a bargaining representative. I therefore dissent.

The correct principles go back at least as far as 1986, when the Board decided *Passavant Health Center*, 278 NLRB 483 (1986). That case dealt with the following sequence of events: *alleged* 8(a)(5) conduct; the filing of a decertification petition; a Board settlement of the alleged 8(a)(5) conduct. The correct disposition was the processing of the petition after the settlement was effectuated. There was no *finding* of alleged 8(a)(5) conduct, and thus there was no basis upon which to dismiss (as tainted) the decertification petition. Thus, the Board held that the petition was to be processed.

In *Douglas-Randall*, *Inc.,* 320 NLRB 431 (1995), the Board ignored these principles and overruled *Passavant*. Member Cohen dissented. He noted the absence of a finding of 8(a)(5) conduct, and he observed that the settling parties could not take away the rights of the decertification petitioner.

In *Liberty Fabrics, Inc.*, 327 NLRB 38 (1998), the Board expanded *Douglas-Randall* to cover non-Board settlements. I agreed with Member Cohen's dissent in *Douglas-Randall*, and a fortiori, I opposed the extension of that case. I stated:

> In the instant case, *Douglas-Randall* is reaffirmed and, to make matters worse, it is extended to non-Board settlements. A non-Board settlement does not establish that unlawful conduct has been committed, any more than does a Board settlement. And, because of its private nature, a non-Board settlement involves less scrutiny than does a settlement that has the Board's imprimatur. Thus, my colleagues permit a private settlement, between the Employer and the Union, to defeat the Section 7 rights of the employees to seek decertification.

In the instant case, *Douglas-Randall* and *Liberty Fabrics* are extended even further. Instead of a settlement (Board or non-Board), there is a contract. And, instead of a decertification petition, there is a rival union petition. The Board, undeterred by prior error, repeats and extends the error. In so doing, they also reverse the Acting Regional Director.

The extension of *Douglas-Randall* and *Liberty* to the facts of this case makes matters even worse. Even accepting arguendo the "settlement" rationale of those two cases, the contract here was not a settlement of the unfair labor practice case. Of course, parties may (and often do) expressly settle such cases at the time of agreement on a contract. However, they did not do so here. Indeed, the Charging Party declined to withdraw the charge, and appealed the dismissal of the charge. Clearly, in its mind, the contract was not a settlement of the charge. As with a tango, it takes two to settle a case.

I recognize that the Acting Regional Director found that the Employer and the Intervenor did intend their contract to be a settlement of the unfair labor practice case. However, this finding was based on their testimony long after the events in question. Further, and more significantly, the Employer and the Intervenor both had a vested interest in making it appear that their contract was a settlement, for that would support their position (now accepted by the Board) that the rival petition should be dismissed. I would be hesitant to accept those representations, particularly where (as here) they are inconsistent with conduct at the time of the events in question.

In short, the parties reached a contract, not a settlement of the unfair labor practice case. That contract came after the RC petition in this case. By treating a contract as a settlement, my colleagues have erected a contract bar to dismiss a petition filed before the contract.

Further, the result reached by my colleagues can easily lead to collusion between an employer and an incumbent union to freeze out a rival union.[1] That is, the incumbent union would file a charge, and the employer and incumbent union would then reach a contract. As if by magic, the rival petition would go away by dismissal.

My colleagues' response to this problem is that the Regional Office can quickly dismiss the incumbent Union's 8(a)(5) charge on the merits, thereby permitting the processing of the petition. However, 8(a)(5) allegations are rarely, if ever, frivolous on the face of the charge. To the contrary, 8(a)(5) charges can be particularly difficult and time-consuming to investigate. This is especially true where, as here, the charge has multiple allegations, including one of bad-faith bargaining. Thus, it is little wonder that the Region in this case never reached a merit determination.

My colleagues respond that the Region could continue the investigation, even after the reaching of a contract, and make an ultimate determination to dismiss. However, it is more likely that, as here, the Region would

[1] The collusion can also operate to freeze out a decertification petitioner, i.e., to freeze in a "sweetheart" union. It is more likely to happen where the employer wishes to freeze out a more militant rival union.

dismiss the charge as moot, and not make a determination on the merits.

In sum, the wisdom of *Passavant* was rejected in *Douglas-Randall*, and the error of *Douglas-Randall* has now been twice extended. The result is that employees are again deprived of their Section 7 right to choose, reject, or change a bargaining representative. I therefore continue to dissent.[2]

[2] My colleagues say that their result effectuates the Act's goals of "fostering stable labor relationships, promoting peaceful settlements and encouraging collective bargaining." My colleagues have omitted the Act's goal of preserving employee free choice.